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(18,769)

Supreme Court of the United States

OCTOBER TERM 1903

No. 181

LUTHER B. YAPLE, TRUSTEE IN BANKRUPTCY OF HANNAH L. WELTNER, DOING BUSINESS AS HANNAH L. WELTNER & SON,

vs.

DAHL-MILLIKAN GROCERY COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief on Behalf of Appellant.

Scholl Printing Company, Chillicothe, Ohio.

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Brief on Behalf of Appellant.

Statement of the Case.

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This case comes into this court on certificate from the Circuit Court of Appeals of the United States, Sixth Circuit. The appeal was taken from the judgment of the District Court, of the United States, Southern District of Ohio, Eastern Division, reversing the decision of the referee in bankruptcy in said District, disallowing the claim of the appellee, a creditor, whose claim had been presented to the referee for allowance.

The claim of the appellee as a creditor of the bankrupt for a balance of $764.33, due to it for goods and merchandise sold and delivered to the bankrupt, was filed with and allowed by the referee in bankruptcy on December 21, 1901, and afterwards, to-wit: on said 21st day of December, 1901, appellant herein filed his petition with said referee asking that said claim be disallowed and expunged for reason that preferences had been received by appellee herein and had not been surrendered by it.

On the hearing of which petition for dissallowance on December 23rd, 1901, appellant and appellee agreed upon a

statement of facts upon which and the argument of council, said matter was submitted to said referee who found that appellee had received preferences in the sum of $101.82, which had not been surrendered by it and ordered that said claim be disallowed and expunged, unless within five days said claimant should surrender to said trustee, appellant herein, said sum of $101.82 and that upon the return and surrender to the trustee by claimant of such preferences, said claim should be allowed for the sum of $866.15. Claimant, appellee herein, refused to surrender and pay over to the trustee said sum of $101.82 or any other sum. From this order and decision of the referee, the claimant, appellee herein, appealed to the District Court of the United States for the Southern District of Ohio, Eastern Division. The District Court reversed the judgment of the referee and allowed the claim, as filed, for the sum of $764.33, and from the judgment of the District Court appellant appealed to the Circuit Court of Appeals, Sixth Circuit, and by that Court the case was certified to this Court.

The error relied on is that the District Court of the United States for the Southern District of Ohio, Eastern Division, erred in reversing the judgment of the referee disallowing the claim of the Dahl-Millikan Grocery Company, appellee herein. The agreed statement of facts between the parties herein, appearing on pages 1, 2 and 3 of the certificate in this case, discloses that at all times within four months next preceding the filing by the bankrupt, the bankrupt was insolvent, and that during all of said period the bankrupt was engaged in carrying on a mercantile business at a place called Summitt Hill in Ross County, Ohio; that during all of said period appellee was carrying on a wholesale grocery and supply business at Washington C. H., Fayette County, Ohio; that during said period the bankrupt made various purchases of merchandise from the appellee herein, amounts and dates of said purchases being as follows:

June	25, 1901,	$14 74	July	31, 1901,	17 92
June	25, 1901,	30 01	Aug.	5, 1901,	17 84
June	29, 1901,	25 24	Aug.	5, 1901,	40 10
June	29, 1901,	5 20	Aug.	14, 1901,	35 19
July	3, 1901,	35 26	Aug.	14, 1901,	60 03
July	3, 1901,	59 14	Aug.	19, 1901,	22 56
July	10, 1901,	22 24	Aug.	24, 1901,	7 98
July	10, 1901,	11 57	Aug.	24, 1901,	38 17
July	12, 1901,	5 90	Aug.	28, 1901,	10 65
July	12, 1901,	23 59	Aug.	28, 1901,	64 76
July	17, 1901,	11 17	Aug.	30, 1901,	25 87
July	17, 1901,	28 82	Sept.	10, 1901,	16 62
July	30, 1901,	12 24	Sept.	10, 1901,	18 77
July	30, 1901,	38 83	Sept.	25, 1901,	33 15
July	31, 1901,	56 06	Sept.	25, 1901,	54 38
July	31, 1901,	40 32	Oct.	11, 1901,	56 88

that during said period said bankrupt drew checks in favor of appellee herein on dates and of the amounts following to-wit;

June	14, 1901,	70 58	July	16, 1901,	40 60
June	24, 1901,	47 09	July	30, 1901,	99 59
July	1, 1901,	32 35	Aug.	13, 1901,	85 03
July	2, 1901,	75 81	Aug.	27, 1901,	81 59
July	9, 1901,	38 50	Sept.	10, 1901,	102 23
July	11, 1901,	40 01			

that said checks were received by appellee herein and credited by it on its account with said bankrupt on the following dates respectively:

June	21, 1901	July	22, 1901
June	29, 1901	Aug.	6, 1901
July	6, 1901	Aug.	20, 1901
July	9, 1901	Aug.	31, 1901
July	16, 1901	Sept.	17, 1901
July	17, 1901		

that said appellee upon receiving said checks deposited them,

as received, in its general account with its bankers in the city of Washington C. H., Ohio, either on the day said checks were respectively received or on the following day; and that each of said checks so received and deposited by it were forwarded by the bankers of the appellee at Washington C. H., through the usual channels for collection, to Rockhold, Brown & Co., bankers at Bainbridge, Ohio, upon whom each of said checks was drawn, by whom said checks were received and paid as follows:

June 21, 1901	July 22, 1901
June 29, 1901	Aug. 6, 1901
July 6, 1901	Aug. 20, 1901
July 9, 1901	Aug. 31, 1901
July 16, 1901	Sept. 17, 1901
July 17, 1901	

that in addition to the payments made by check as aforesaid bankrupt paid to appellee on September 25, 1901, the sum of $40.52: that neither appellee herein, nor any agent for it acting therein, knew or had reasonable cause to believe that it was intended by the several payments of said money by check and cash as aforesaid to give appellee a preference or that said bankrupt was insolvent; that the various purchases of goods made by bankrupt from appellee above mentioned were without security of any kind and without knowledge on the part of appellee of the insolvency of the bankrupt, and said goods became a part of the estate of said bankrupt; that on September 25, 1901, bankrupt drew her check in favor of appellee herein for the sum of $56.88, which said check was received by appellee herein on September 27, 1901, and by appellee credited on its account with bankrupt and deposited said check with its bankers at Washington C. H., Ohio, by whom the same was forwarded through the ordinary channels for collection to Rockhold, Brown & Co., of Bainbridge, Ohio, bankers, upon whom said check was drawn, but upon pre-

sentation said check was not paid because said bankrupt had no funds on deposit to her credit and said check was protested, and on the return of said check and protest to appellee, on October 11th, 1901, said sum of $56.88 was by appellee charged to the account of said bankrupt.

It is not in dispute or issue between the parties herein that the various payments received by appellee above mentioned were, and are, by reason of the fact that said bankrupt was insolvent when each of the said payments was made, preferences. Appellant herein conceded that as against each of said payments or preferences so received by appellee, the amount of *subsequent* credits given bankrupt by appellee, without security, for property which became part of bankrupt's estate, can be deducted thereby diminishing and reducing the amount which, but for said subsequent credits, would otherwise have to be refunded by the appellee.

Our position is, and the referee held, that *each* payment received by the appellee constitutes a preference and was, and is, to be treated as one of a series of business transactions between the bankrupt and appellee during the four months next preceding the filing by bankrupt of her voluntary petition in bankruptcy; and while it is yet an unsettled question, with decisions on both sides, as to whether the provisions of paragraph c, section 60 of the bankrupt act are available to the creditor where the preference has been innocently received, we do insist that his relief cannot be extended beyond the provisions of that paragraph and that the liability to return and surrender preferences cannot be avoided by the fact that there have been *previous* credits and that at most and conceding, perhaps, more than we should, only *subsequent* credits can be set off against preferences. The referee found and held that the appellee herein was entitled to set off against the preferences it had received, *sebsequent* credits given to the bankrupt by it for goods sold and delivered by it to bankrupt in good

faith without security of any kind and which became a part of the bankrupt's estate, and calculated the amount to be refunded upon that theory.

If this construction of paragraph g, section 57, paragraph a, section 60, paragraph b, section 60, paragraph c, section 60 of the bankruptcy act is adopted and followed by this Court, then, we submit, that the decision of the referee is correct, unless the Court hold that the liability to refund a preference can be avoided by the fact that there has been a previous and former credit given the bankrupt by the claimant. That this can be done is in effect the decision of the learned District Judge below who reversed the decision of the referee. This is the first and chief question in this case,

Should this Court hold that our contention and the decision of the referee is correct, then it will, we apprehend, be also necessary to decide as to the date when the various checks given the appellee by the bankrupt became payments. As will be noted, the several checks drawn by the bankrupt on said bankers, Rockhold, Brown & Co., at Bainbridge, Ohio, in favor of appellee were received by the appellee several days after they were drawn and on receipt were severally credited by appellee to bankrupt and deposited by appellee with its bankers at Washington C. H., Ohio, by whom said checks were forwarded through the usual channels to Rockhold, Brown & Co., bankers, at Bainbridge, Ohio, upon whom each of said checks were drawn, for collection, and by whom each of said checks were paid, except the check of September 25th, 1901, for $56.88, which was protested for want of funds, and on return of said check (and protest) its amount was charged by appellee to bankrupt. It will be noted that in almost, if not quite, every instance a period of about one week elapse from the time said checks were severally drawn by the bankrupt before they were received and paid by the bank upon which they were drawn. Our contention

is and the referee held, that the date of payment is not that upon which said checks were severally drawn by bankrupt or the dates they were severally received by the appellee, but the date when they were received and paid by the bank upon which they were drawn, viz., Rockhold, Brown & Co.; Bainbridge, Ohio.

Argument.

We apprehend that the decision of the first and chief question of this case is determined by the construction to be placed upon paragraph c, section 60 of the bankrupt act, which is as follows:

"If a creditor has been preferred and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

In his decision of this case when it was before him, the referee gave the claimant, appellee herein, the benefit of the set off of new credits against preferences previously received by it, by setting off against preferences received by it *subsequent* credits, and thus found that there remained a balance of $101.82 of preferences which had been received by appellee as against which there was no subsequent or new credit to set off and which amount he, therefore, held would have to be refunded by appellee before its claim would be allowed. The District Court reversed the action of the referee, holding that all credits should be added together and from their sum the total amount of all preferences which had been received should be deducted. The result of this decision is that it permits the set off against a preference of credits given before the preference. Of this there can be no dispute and the square question presented is whether the liability to refund a preference can be avoided by the fact that the creditor

has, *previous* to the receipt of the preference, extended credit to the bankrupt.

To permit the creditor offering to prove his claim to retain payments received subsequent to the increasing of the debt, and prove for the balance, is to enable him to get a larger percentage of his debt, because to the extent he has received payment he has 100 per cent. of his claim and then takes a like per centum with the other creditors on the balance. If the payment has induced him to give further credits on the strength of such payment being made, he gets the benefit by being allowed to set off the amount of such subsequent credits against such pay. But the debt having been incurred and being in existence, can he be allowed to retain a subsequent preferential payment? Is he not thereby enabled "to get a greater percentage of his debts than any other creditors of the same class? Most certainly. To accomplish such a result indirectly by attempting to lump together a series of separate and distinct business transactions, and calling them, collectively and fictitiously, "one transaction," as was done by the learned District Judge, is, we submit, in violation of the spirit of the bankruptcy act, which seeks equality among the creditors, as well as in direct violation of the plain language of paragraph c, section 60. The creditor is fully protected by the paragraph cited as to any sales the payment may induce, but, having made sales and become a creditor he cannot, in justice to other creditors of the same class, be permitted to retain it and also take his full per cent. with them in the assets which remain. That the credits given happen to be in excess of the payment received does not justify so radical a departure from the plain words of the act. "Hard cases make bad law." Other creditors may have (and in case at bar actually did) extended credit and thereby increased the estate of the bankrupt and had no payments whatever. Every creditor increased by his

credit the estate of the bankrupt. Every creditor contributed to the estate of the bankrupt; otherwise he would not have been a creditor. In the matter of Colton Export and Import Co., the creditor, Leach, had, during the period of insolvency, made loans to the bankrupt amounting to $40,000 and subsequently received payments amounting to $26,000. The creditor sought to avoid the return of the preferences, because he had put more into the estate than he had received from it, but the court by Adams, J. say: "He had, after insolvency and during the four months preceding the filing of the petition, put more money into the estate than he had received from it, but he had received payments on account. Other creditors had put merchandise into the estate during the same period and had received nothing whatever on account. Money and merchandise cannot be legally distinguished in these matters. (Pirie v. Trust Co., 182 U. S. 443, 5 Am. B. R. 814; McKey v. Lee, 5 Am. B. R. 271,) and I do not see how it is possible here to avoid the unmistakable meaning of section 60 a, providing that a preference exists where the effect of the transfer will be to enable any one of a bankrupt's creditors to obtain a greater percentage of his debt that any other of such creditors of the same class, and of the provision of section 57 g, that the claims of creditors who have received preferences shall not be allowed unless there is a surrender of the preferences. In the case Leach loaned the bankrupt, say, $40,000, and received payment of, say, $26,000. If his present claim is allowed and there should be a dividend of 50 per cent. he would receive $7,000 on the balance, and altogether 33-40ths, or about 82 per cent. of his claim. The other creditors, participating in the dividend only, would receive 50 per cent, of their whole claim.

In the case of Morey Merch. Co. v. Schiffer, 7 Am. B R. 670, the question was as to whether subsequent credits could be set off, under par. c, section 60, against previous prefer-

ences innocently received by the creditor, the trustee contending that the set off of subsequent credits provided for by paragraph c, only applied to cases when there has been a recovery from the creditor under paragraph b, section 60. The court held that the application of paragraph c was not to be limited to paragraph b, but applied as well to preferences innocently received. Only credits *subsequent* to the preferences were sought to be set off.

The facts in the case of McKey vs. Lee, decided by the Circuit Court of Appeals for the 7th Circuit (45 C. C. A. 127, 105 Fed. 923,) are substantially the same as in the case at bar. In the McKey case there were a series of payments and credits and the sum of the credits within the four months prior to the filing of the petition in bankruptcy was in excess of the payments received during the same period. The last payment, however, was made December 22nd, 1899, and *subsequent* thereto no credits had been given. Previous payments had been more than equaled by subsequent credits, but there was no credit subsequent to the payment of $500 on December 22nd 1899. The District Court held, notwithstanding the fact that the credits exceeded the payments and the net indebtedness of the creditor had been increased, that before proving its claim the creditor should refund the payment of $500 made on December 22nd, 1899. This decision was affirmed by the Circuit Court of Appeals.

In Gans vs. Ellison, 8 Am. B. R. 153 (U. S. C. C. A. Third Circuit, April 22nd, 1902,) there were two creditors' claims in controversy. J. B. Ellison & Sons were creditors in the sum of $6,671.89 and within four (4) months before the petition in bankruptcy was filed and when the bankrupt was insolvent, but without knowledge of that fact, received from the bankrupt on account of said indebtedness two (2) payments of $900.00 each, or $1,800 in all, and afterward, in good faith, sold and delivered to the bankrupt, upon credit, without se-

curity, merchandise to the value of $1,703.15. On offering to prove its claim, the creditor tendered to the trustee the sum of $96.82, the excess of the preferences it had received over the new credits. The trustee insisted upon a return of the whole amount of preferences received. The other creditor, E. O. Thompson's Sons, were creditors of the bankrupt in the sum of $3,113.46 and innocently received on account of this indebtedness payments amounting in all to $540.65, and *afterwards*, in good faith, sold and delivered to the bankrupt, without security of any kind, additional merchandise to the amount of $586. 56, which became a part of the estate of the bankrupt. Taking into account the excess of new credits over the preferences, $46.11, and adding same to amount of previous credits remaining unpaid, made a balance of $3,159.37, which creditor sought to prove as a claim. The trustee contended the entire amount of the preference should be refunded and denied the right of the creditor to set off subsequent and new credits. In this matter it will be noted that the payments were less than the subsequent credits and that as a result of the business transactions between bankrupt and the creditor the estate of the bankrupt was increased. The Court, by Archeson, Circuit Judge, held that the *subsequent* credits could be set off against the amount of the previous preference, the syllabus of the case being:

"A creditor who has innocently received a preferential payment from an insolvent debtor within the four months prior to bankruptcy is entitled to set off against the same the amount of any new credits given to the debter as provided in section 60 c, *but any excess of payments over the new credits must be surrendered before proof of his claim is allowed.*"

In case of Kahn vs. Export & Commission Co., 8 A. B. R. 157 decided by the United States Ciruuit Court of Appeals, 5th Circuit, March 15th, 1902, the second paragraph of the syllabus is as follows:

"A creditor who has innocently received a preferential payment from an insolvent debtor within four months prior to bankruptcy, which must be surrendered under section 57 g, before proof of his claim can be allowed, is entitled under section 60 c to set off against the preferential payment, the amount of *subsequent* credits for goods sold in good faith and without security which becomes a part of the bankrupt's estate."

This case affirms the decision of District Judge Newman in the District Court of the United States for the Northern District of Georgia, of whose decision the following syllabus was prepared:

"Bankruptcy act, 1898, section 60 c, entitles a creditor who has received preferential payment on account, but who has extended further credits as therein specified, to a deduction of the amount of such new credits from the preferences he would otherwise be required to surrender before proving the remainder of his debt, and is not limited in its application to cases where the trustee sues to recover the preferences."

In the case of the matter of Wm. Bothwell, 8 A. B. R. 213, decided March 1st, 1902, the following state of facts existed as to one of the creditors whose right to prove a claim was in dispute:

P. Pohalski & Co., the creditor, received from the bankrupt, while insolvent, but without any knowledge on their part that the bankrupt was insolvent, the sum of $1,227.38, and subsequently extended new credit to the amount of $1,123.90, and they offered to refund to the trustee the difference between these amounts viz., the sum of $103.48 and offered to prove their claim against the estate for previous credits in sum of $1,563.45. The trustee insisted that the entire preferences received must be refunded before the creditor should be allowed to prove any claim. The right to set off the *subsequent* and new credit against the previous

preferences was allowed, the syllabus of the decision being as follows:

"A creditor who *after* receiving an innocent preference in good faith extends *further* credit to the bankrupt, is entitled to set off the amount of the preference received while the bankrupt was insolvent against the amount of new credit remaining unpaid at the time of the adjudication in bankruptcy."

If the theories that because the credits given exceed the preferences received and thereby increase the estate of the bankrupt, or that the various business transactions between the bankrupt during the period of four (4) months next preceding the filing of the petetion in bankruptcy, are to be considered as "one transaction" for the purpose of evading the plain language of 60 c, then Pohalski & Co. should not have been required to refund anything.

In the same case the Hudson River Ice Co., a creditor, received from the bankrupt while insolvent, on October 6th 1899, but without any knowledge on the part of the Company that the bankrupt was insolvent, the sum of $558.80 in part payment of a claim of $1,599; and between October 6th and January 25th, 1900, it sold to the bankrupt, in good faith, merchandise amounting to $803.20, which new credit remained unpaid at the time of the adjudication in bankruptcy. The Company claimed the right to set off the amount of such new credit, viz., $803.20 and to prove its claim for the sum of $1,843.40. The claim was allowed. It will be noted that the credit set off was a *subsequent* credit. In no case which we have been able to find has any court given its sanction to set off against a preference anything but a *subsequent* credit.

A payment received by the creditor from the bankrupt, during the insolvency of the latter and within four (4) months next preceding the filing of the petition in bankruptcy unquestionably does enable the creditor to get a greater

percentage of his debt than other creditors of the same class, —section 60 c. That the payments, and all of them, received by the appellee herein are preferences is not in dispute. Section 57 g, provides that the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences. To this rule requiring the surrender of all preferences received before proving a claim, the courts have held that to the extent therein provided for, section 60 c constitutes an exception. This exception, in the plainest terms, permits the creditor to deduct or "set off" against the preference "further credits *afterward* given in good faith." The referee below gave the appellee the full benefit of this exception and found that it had received preferences amounting to $101.82 in excess of "further credits afterwards given" the bankrupt by it. The District Judge holds that a previous credit remaining unpaid can be offset against a subsequent preference. While the decision is not so expressed, yet in no other way can the result arrived at be reached. Believing the decision of the District Court irreconcilable and in conflict with the language of section 60 c of the bankruptcy act and not in accord with the decisions of the courts, we therefore ask that the judgment of the District Court be reversed and that of the referee affirmed.

A further question in this case is as to when a check given the creditor by the bankrupt becomes a payment within the meaning and terms of the bankruptcy act. As has been heretofore shown, a period of about one week elapse between the time the various checks drawn by the bankrupt to the order of the creditor, appellee herein, and the payment thereof by the bank upon which they were drawn. That the giving of the check was not treated as absolute payment is shown by the fact that on receipt back from the bank on which it is drawn of the check of September 25th, 1901,

which was protested, the amount of the same was immediately charged up by appellee to bankrupt. We insist that the finding of the referee that the date upon which the check was received and paid by the bank upon which it is drawn constitutes the date of the payment. Until the check is paid the money is under the control and dominion of the bankrupt.

Matter of Amasa Lyon 7 A. B. R. 412.

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